No. 95-1608

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LOU McKENNA, *et al.*,

Petitioners,

—v.—

TWIN CITIES AREA NEW PARTY,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, MINNESOTA CIVIL LIBERTIES UNION, THE BRENNAN CENTER FOR JUSTICE, AND PEOPLE FOR THE AMERICAN WAY, IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to defending the principles of liberty and equality embodied in the Bill of Rights and this nation's civil rights laws. The ACLU of Minnesota is one of its statewide affiliates.

The right to participate fully in the nation's political processes is central to the constitutional scheme. The ACLU has, therefore, appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*, on behalf of voters, candidates and political parties that have been effectively disenfranchised by unduly cumbersome or unduly restrictive electoral laws. This case raises those issues anew. Its proper resolution is thus of critical importance to the ACLU and its members around the country, many of whom live in states that have statutes similar to the Minnesota law being challenged in this case.

The Brennan Center for Justice is a partnership, designed to honor Justice William Brennan, Jr., between law clerks who served Justice Brennan during his thirty-four years as an Associate Justice of the United States Supreme Court, and the faculty of New York University School of Law. Before giving his blessing to the enterprise, Justice Brennan extracted a promise that the Brennan Center would function as a genuinely independent center of thought on significant legal issues affecting American life. He particularly insisted that no special deference be paid to his views, or to his opinions. Justice Brennan played no role in the formulation of this brief, or in the decision to file a brief in this case.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

The Center's ideal is to unite the intellectual resources of the academy with the pragmatic expertise of the bar in an effort to assist both courts and legislatures in developing practical solutions to difficult problems in areas of special concern to Justice Brennan. In keeping with Justice Brennan's legendary contributions to the law of American democracy, the Center has chosen to concentrate initially on a Democracy Project.

People For the American Way (People For) is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of pluralism, liberty, and participatory democracy, People For now has over 300,000 members nationwide.

People For has frequently represented parties and filed *amicus curiae* briefs before this Court in important First Amendment and civil rights litigation. People For has joined in filing this *amicus* brief to help vindicate the important constitutional principles at stake in this case, particularly the right of citizens to associate and to participate fully and effectively in the democratic political process.

Amici submit this brief in the hope that it will prove useful to the Court in considering the difficult First Amendment issues raised by attempts to regulate efforts by third parties to play a vigorous role in the democratic process.

STATEMENT OF THE CASE

Since 1901, Minnesota has prohibited "fusion candidacies," in which a candidate appears on the ballot as the nominee of more than one political party. Under Minnesota law, if a candidate has accepted the nomination of one political

party, the candidate may not appear as the standard bearer of another party on the ballot, even where, as here, the candidate and both parties attempt to forge the electoral alliance. *See* Minn. Stat. §204B.04, subd. 2; and §204B.06, subd. 1(b).

In this case, Rep. Andy Dawkins accepted the nomination of the Minnesota Democratic-Farmer-Labor Party (DFL), the Minnesota affiliate of the national Democratic Party, in connection with the 1994 elections to the Minnesota House of Representatives. He was also duly selected as the nominee of the New Party, a recently formed political party that had qualified for a place on the Minnesota ballot by demonstrating the required modicum of popular support. Minn. Stat. §204B.08, subd. 3(c). When the New Party attempted to designate Rep. Dawkins as its standard bearer, the designation was rejected by Minnesota officials because Dawkins was also the designee of the DFL. No objection to the New Party's effort to designate Dawkins as its candidate was lodged by Dawkins, or by the DFL.[2]

The district court upheld the absolute ban on fusion candidates, reasoning that the ban was a permissible device to prevent voter confusion, and to assure a clear winner. 863 F.Supp. 988 (D.Minn. 1994). The Eighth Circuit reversed, holding that an absolute ban on fusion candidacies violates the associational rights of adherents of the New Party. 73 F.3d 196 (8th Cir. 1996). This Court granted *certiorari* to resolve a conflict between the Eighth Circuit decision, and an earlier split-decision of the Seventh Circuit upholding a similar effort by Wisconsin to ban fusion candida-

[2] Minnesota argues that the DFL's failure to object to the nomination of its candidate by the New Party in 1994 should not be taken as consent. But the knowing failure to interpose an objection cannot be viewed in any other way. Significantly, the DFL has never appeared in this litigation to assert a contrary position.

cies. *Swamp v. Kennedy*, 950 F.2d 383, *reh'g denied*, 950 F.2d 388 (7th Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992).

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

The body of the Constitution sets forth a sophisticated blueprint for complex democratic governance. The text is, however, virtually silent about how to elect the government.[3] The critical task of defining, and preserving, the right to participate in democratic politics has fallen to the amendment process, and to this Court.

No fewer than twelve constitutional amendments describe the constitutional prerequisites for a vigorous, self-governing republic of political equals. The structure of the First Amendment mirrors the life cycle of a democratic idea, uniting for the first time in a single document the substantive preconditions for a democratic polity -- freedom of thought, freedom of speech and press, freedom of assembly and association, and freedom to petition for redress of grievances. The Fourteenth Amendment assures membership in the democratic polity, guaranteeing state citizenship and

[3] Except for setting forth age, citizenship, and residence requirements for candidates, the body of the Constitution provides almost no substantive guidance concerning democratic ground rules. Article I, Section 2, provides that "electors" of the House of Representatives shall have the same qualifications as "electors" for the most numerous house of the state legislature. Article I, Section 4, leaves the time, place, and manner of congressional elections to the states, unless Congress acts. Article II, Section 1, leaves to the states the mechanism for choosing presidential electors. Article IV, Section 4, guarantees each state a "Republican form of government" but, since *Luther v. Borden*, 48 U.S. 1 (1849), the clause has been treated as judicially unenforceable. Finally, Article VI provides that no religious test may be used for office or any public trust.

equal protection of the laws to all "persons." Indeed, of the seventeen amendments since the adoption of the Bill of Rights, eleven have dealt with democratic governance.[4] If one excludes the two Prohibition amendments, since 1791 the only amendments that have not dealt with implementing democratic ideals have been the Eleventh (reinstating state sovereign immunity); the Thirteenth (abolishing slavery); the Sixteenth (authorizing the income tax); and the Twenty-seventh (regulating congressional compensation). Moreover, the arc of the twelve "democracy" amendments could not be clearer -- a steady expansion of constitutional protection of the right to vote, the right to run for office, and the right to associate freely for the advancement of political ideals.

A similar dynamic underlies the democracy decisions of this Court. After an uncertain beginning caused, in part, by the lack of an explicit provision protecting democracy in the text of the original Constitution itself,[5] the Court has recognized that an amalgam of constitutional amendments, an-

[4] In addition to the First and Fourteenth Amendments, the Twelfth Amendment provides for the separate election of the President and Vice President, in the wake of the 1800 Electoral College tie between Thomas Jefferson and Aaron Burr. The Fifteenth Amendment bans racial discrimination in access to the ballot. The Seventeenth Amendment provides for democratic election of the Senate. The Nineteenth Amendment extends the vote to women. The Twentieth Amendment eliminates the undemocratic "lame duck" Congress. The Twenty-second Amendment establishes a two-term limit for the Presidency, as a safeguard against undue concentration of power. The Twenty-third Amendment extends the vote in presidential elections to the residents of the District of Columbia. The Twenty-fourth Amendment abolishes the poll tax. The Twenty-fifth Amendment provides a temporary, democratically acceptable, solution for Presidential incapacity. The Twenty-sixth Amendment extends the vote to 18-year olds.

[5] *E.g.*, *Giles v. Harris*, 189 U.S. 475 (1903); *Pope v. Williams*, 193 U.S. 621 (1904); *Grovey v. Townsend*, 295 U.S. 45 (1935); *Breedlove v. Suttles*, 302 U.S. 277 (1937).

chored in the First and Fourteenth, provide powerful support for five formidable lines of precedent that converge in this case to hold Minnesota's absolute ban on fusion candidacies unconstitutional.

First, the Court has provided effective protection for the right to vote. Beginning with decisions defending the right to vote against both overt and sophisticated racial discrimination,[6] the Court has carefully mapped the substantive contours of the right to cast an equal, and effective, ballot.[7] Most recently, in *Burdick v. Takushi*, 505 U.S. 428 (1992), the Court rejected attempts to analogize voting to a pure act of self-expression.[8] Instead, the Court insisted on treating voting as a genuine exercise of power, enabling an individual to register a binding preference for a candidate, and to instruct the successful candidate about how to carry out the governmental function. Minnesota's absolute refusal to permit fusion candidacies impinges directly on the *Burdick* Court's insistence that voting be equated with a genuine exercise of political power.

Second, recognizing that organized political parties are integral to the exercise of political power, the Court has both protected the right to form new political parties,[9] and has required that a political party wishing to participate formally in the electoral process demonstrate a minimum modicum of popular support.[10] Under the Court's precedents, just as the *Burdick* Court equated the act of voting with an exercise of power, a political party seeking formal access to the ballot must do more than merely express an idea; it must demonstrate a minimal capacity to perform as the vehicle for the exercise of political power. Minnesota's absolute refusal to permit fusion candidacies severely restricts the ability of new political parties to develop such a power base, relegating third parties to marginal vehicles for the expression of protest.

Third, recognizing that formal political parties are vessels of power, the Court has sought to protect the integrity and internal stability of political parties from internal implosion and external subversion.[11] Minnesota's absolute ban on fusion candidacies goes far beyond the protective devices approved by this Court, since it applies even when both par-

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[6] *Ex parte Siebold*, 100 U.S. 371 (1879); *Ex parte Yarbrough*, 110 U.S. 651 (1884); *Guinn v. United States*, 238 U.S. 347 (1915); *United States v. Mosley*, 238 U.S. 3477 (1915); *Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932); *Lane v. Wilson*, 307 U.S. 268 (1939); *United States v. Classic*, 313 U.S. 299 (1941); *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953).

[7] *E.g., Baker v. Carr*, 369 U.S. 186 (1962); *Gray v. Sanders*, 372 U.S. 368 (1963); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Carrington v. Rash*, 380 U.S. 89 (1965); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Kramer v. Union Free School District*, 395 U.S. 621 (1969); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Evans v. Cornman*, 398 U.S. 419 (1970); *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970); *Dunn v. Blumstein*, 405 U.S. 330 (1972). *But see Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973).

[8] In *Burdick*, the Court rejected a challenge to Hawaii's refusal to permit write-in ballots in certain elections. The Court rejected the notion that write-in voting was required to permit a voter to express opposition to proposed candidates. The Court held that voting was an exercise of power, not merely an expression of views.

[9] *E.g., Norman v. Reed*, 502 U.S. 279 (1992); *Moore v. Ogilvie*, 394 U.S. 814 (1969); *American Party of Texas v. White*, 415 U.S. 767 (1974). *See generally NAACP v. Alabama*, 357 U.S. 449 (1958)(protecting the right to political association under the First Amendment).

[10] *Jenness v. Fortson*, 403 U.S. 431 (1971); *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986).

[11] *E.g., Rosario v. Rockefeller*, 410 U.S. 752 (1973); *Kusper v. Pontikes*, 414 U.S. 51 (1973); *Storer v. Brown*, 415 U.S. 724 (1974).

ties, and the candidate, wish to mount a fusion candidacy.

Fourth, the Court has understood that a political party, as an organization dedicated to affecting the allocation of political power, must enjoy substantial autonomy to carry out a strategic agenda for action.[12] Minnesota's absolute ban on fusion candidacies places obvious roadblocks to the strategic autonomy of both major and minor parties. Major parties cannot accept the ballot support of defined aspects of the electorate needed to enhance the potential for victory. Third parties cannot forge formal electoral alliances designed to open the road to power.

Fifth, when the legislature has imposed rules that act to insulate the major political parties from effective political competition, this Court has attempted to protect the market in political power from unfair restraints on free political trade.[13] Minnesota's absolute ban on fusion candidacies is a classic technique to prevent third parties from evolving into genuine competitors for power.

Thus, viewed from the perspective of a voter wishing to support a fusion candidate; a major party wishing to expand its electoral base; a minor party wishing to forge an electoral alliance; or a candidate wishing to embrace an additional constituency, an absolute ban on fusion candidacies cannot withstand constitutional scrutiny.

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[12] *E.g., Colorado Republican Campaign Committee v. FEC*, __ U.S. __, 64 U.S.L.W. 4663 (June 26, 1996); *Tashjian v. Republican Party*, 479 U.S. 208 (1986); *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214 (1989); *Democratic Party v. Wisconsin ex. rel. La Follette*, 450 U.S. 107 (1981); *Cousins v. Wigoda*, 419 U.S. 477 (1975).

[13] *E.g., Williams v. Rhodes*, 393 U.S. 23 (1968); *American Party of Texas v. White*, 415 U.S. 767; *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

ARGUMENT

WHEN, AS HERE, ALL INTERESTED PARTICIPANTS WISH TO SUPPORT A FUSION CANDIDACY, MINNESOTA'S ABSOLUTE BAN VIOLATES: (A) A THIRD-PARTY VOTER'S RIGHT TO CAST AN EFFECTIVE BALLOT; (B) A THIRD-PARTY'S RIGHT TO CHOOSE ITS CANDIDATE; (C) THE RIGHT OF MAJOR AND MINOR PARTIES TO EXPAND THEIR ELECTORAL BASES; AND, (D) A CANDIDATE'S RIGHT TO EMBRACE A NEW CONSTITUENCY

The usual effort to mount a fusion candidacy involves four participants: the candidate, a major party, a third party, and voters wishing to support the fusion candidate on a third-party line. A negative response to fusion by any of the participants dooms the enterprise.

The putative fusion candidate may decline to be the nominee of more than one party or, indeed, of any party at all. The third party may choose another nominee. Voters belonging to either or both parties may decline to support the fusion candidate at the polls or, even, refuse to place the fusion candidate on the ballot. Finally, while the refusal of a major party to permit its willing nominee to be the candidate of another party would raise complex constitutional issues, it is likely that the opposition of the major party would, as a practical matter, preclude an "involuntary" fusion candidacy. Thus, as here, the fusion process will almost always involve a concerted effort by all four participants to achieve a shared political goal. The stark issue raised by this appeal is whether Minnesota can override the cumulative First Amendment interests of all four participants by imposing an absolute ban on fusion candidacies. Viewed from the perspective of any of the participants, an absolute ban is unconstitutional. Measured against the cumulative

weight of the participants' First Amendment interests, an absolute ban must be struck down.

A. An Absolute Ban On Fusion Candidacies Violates The Right To Vote

In *Wesberry v. Sanders*, 376 U.S. at 17, this Court recognized the primacy of the right to vote:

> No right is more precious in a free country than that of having a choice in the election of those who make the laws under which, as good citizens, they must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

Accordingly, the Court has developed a formidable body of precedent protecting an individual's right to cast an equal, effective ballot. In case after case, the Court has recognized that the essence of the right to vote is power, not symbolism. *E.g.*, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)(invalidating racial gerrymander); *Baker v. Carr*, 369 U.S. 186 (requiring mathematical equality of voting power); *Carrington v. Rash*, 380 U.S. 89 (guaranteeing vote to *bona fide* residents); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (invalidating poll tax); *Kramer v. Union Free School District*, 395 U.S. 621 (guaranteeing vote to affected residents); *Cipriano v. City of Houma*, 395 U.S. 701 (same); *Evans v. Cornman*, 398 U.S. 419 (1970)(same); *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (same); *Dunn v. Blumstein*, 405 U.S. 330 (invalidating durational residence requirements for voting); *Davis v. Bandemer*, 478 U.S. 109 (1986)(recognizing cause of action for political gerrymander).

Minnesota argues that its prohibition on fusion candidacies only peripherally interferes with the right to vote because third-party voters remain free to cast a ballot for the

putative fusion candidate, albeit as the nominee of another party; alternatively, third-party voters may remain faithful to their party by supporting its own nominee. The only electoral choice denied a third-party voter, Minnesota contends, is the ability to support another party's nominee as the standard bearer of the voter's own party.

Minnesota's understandable effort to minimize its interference with the right to vote is premised on an anemic conception of what it means to cast a ballot. It treats voting as a quixotic act of self-expression, not an exercise of power. In *Burdick v. Takushi*, 505 U.S. 428, however, a majority of this Court rejected an attempt to characterize voting as merely another form of self-expression. Rather, the Court held, voting in a democracy is a unique exercise of power; power to determine the winner, and power to instruct the winner on how to govern.

Unfortunately, instead of respecting the vote as an exercise of real power, Minnesota's ban on fusion candidacies forces putative fusion voters to cast a "symbolic" protest ballot for a third-party candidate who cannot win, or reinforce a major political party whose platform they oppose. Either alternative deprives the voter of one-half of what it means to cast an effective ballot in a democracy

Minnesota's argument overlooks the fact that voting is an exercise of power in two time dimensions: present and future. In the immediate present, voting determines who wins. But, by acting as a public plebescite on the issues, voting also influences how the winner will actually govern. Elections provide mandates as well as jobs. An absolute ban on fusion candidacies requires putative fusion voters to surrender one of the power dimensions of a democratic ballot. Under Minnesota's system, putative fusion voters may insist on the power to help choose the winner by voting for the nominee of a major party. But the price of voting for a candidate with a real chance to win is reinforcing a political

mandate with which fusion voters may strenuously disagree. *Wooley v. Maynard*, 430 U.S. 705 (1977); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). In effect, for a fusion voter, the price of exercising voting power in the present is the surrender of voting power to influence the future.

Conversely, under Minnesota law, putative fusion voters may attempt to influence the future by supporting the "protest" nominee of a third party. But the price of sending a heartfelt message about the future is renunciation of the power to influence the present. Either way, Minnesota deprives putative fusion voters of a critical aspect of ballot power.

B. An Absolute Ban On Fusion Candidacies Violates The Associational Freedom Of Adherents Of A Third Party

This Court has recognized that voting power cannot be exercised effectively in isolation. In order to make a vote count, it is generally necessary to band together with other like-minded persons to advance a particular candidate, or a given position on the issues. Accordingly, the Court has carefully protected the right of citizens to form new political parties. *Norman v. Reed*, 502 U.S. 279 (cannot inhibit statewide growth of new party); *Moore v. Ogilvie*, 394 U.S. 814 (invalidating unfair restrictions on statewide ballot access); *American Party of Texas v. White*, 415 U.S. 767 (invalidating refusal to list minor parties on absentee ballots). *See generally NAACP v. Alabama*, 357 U.S. 449.

As with voting, however, the Court has declined to view formal political parties as mere organs of expression. Rather, the Court has treated political parties as vessels for the transmission of electoral power. Thus, while no restrictions may be imposed on the formation or structure of ordinary political associations, political parties seeking ballot

status may be required to adopt internal governance structures, and may be required to demonstrate a minimum modicum of popular support. *E.g., Marchioro v. Chaney*, 442 U.S. 191 (1979)(upholding requirement of state-wide organization); *Jenness v. Fortson*, 403 U.S. 431 (upholding minimum showing of support for ballot access); *Munro v. Socialist Workers Party*, 479 U.S. 189 (same).

Minnesota argues that its ban on fusion candidacies does not materially burden the right to organize a new political party, since the new party remains free to nominate its own candidate. But, once again, Minnesota confuses symbolism with power. It is true, of course, that adherents of a new political party remain free under Minnesota's scheme to nominate a symbolic protest candidate. But, unless new parties are permitted to make formal electoral alliances by nominating candidates with a real chance to win, the new parties are excluded from power, and relegated to the role of symbolic protest organizations.

In fact, banning fusion candidacies imposes a double-barrelled restriction on the ability of new parties to be anything other than protest movements. First, it denies new parties the freedom to choose the most attractive candidate willing to accept its nomination. If the development of a power base is an important attribute of a political party, walling the party off from a willing candidate with the best perceived capacity to energize the party's potential power base is a devastating liability.

Second, it forces potential adherents of the new party to make the Hobson's choice, described *supra* at 10-12, between expressing a principle and exercising electoral power. A political party that cannot offer its adherents both the opportunity to support a principle, and the ability to participate in the selection process, can never expect to develop a stable power base.

In *American Party v. White*, 415 U.S. 767, the Court struck down a Texas practice that discriminated against small parties by denying them a listing on absentee ballots. Similarly, in *Anderson v. Celebrezze*, 460 U.S. 780, the Court struck down a filing system that forced independents and minor parties to declare far earlier than major party candidates. The discrimination against small parties inherent in the Minnesota scheme is far worse than the restrictions in *American Party* and *Anderson v. Celebrezze*. Instead of being excluded from an absentee ballot as in *American Party*, or forced to organize at an inconvenient time as in *Anderson*, small parties in Minnesota are consigned by law to a symbolic protest role, effectively walled off from participation in the power aspects of the electoral process.

C. An Absolute Ban On Fusion Candidacies Imposes Unnecessary Constraints On The Autonomous Judgment Of A Major Party

Once a political party has been organized, and has developed a significant power base, this Court has recognized a need to protect the party from subversion from without and disintegration from within. Thus, efforts to protect established political parties from "raiding" by outsiders attempting a hostile takeover have been upheld by the Court, as have efforts to prevent "sore loser" disputes from destroying the party. *Rosario v. Rockefeller*, 410 U.S. 752 (upholding 11 month affiliation requirement for voting in primary); *Kusper v. Pontikes*, 414 U.S. 751 (invalidating 23 month affiliation requirement); *Storer v. Brown*, 415 U.S. 724 (upholding durational disaffiliation requirement before running as candidate of another party). But voluntary fusion candidacies, like the candidacy at issue in this case, pose no threat to the integrity or stability of a major party when the majority party has not objected to the fusion.

Where, as here, no threat to the integrity, or stability of a party exists, the Court has recognized that a political party must be free to make strategic decisions about how best to expand its power base. Whether it has involved a party decision to operate an "open" or a "closed" primary, or a decision to endorse an internal candidate, or to spend money in support of the party's own candidate, the Court has held that the strategic judgment of the party is immune to second-guessing by the state. *E.g., Tashjian v. Republican Party*, 479 U.S. 208 (party may decide to hold open primary, despite state law requiring closed primaries); *Democratic Party v. Wisconsin ex. rel La Follette*, 450 U.S. 107 (1981)(convention rule requiring closed primary takes precedence over state law requiring open primary); *Eu v. San Francisco Democratic Party*, 489 U.S. 1989 (invalidating ban on party endorsements of candidates in party primary); *Colorado Republican Party v. FEC*, 64 U.S.L.W. 4663 (government may not forbid independent expenditures by political party in support of party's candidate).[14]

In this case, a major party, the Democratic-Farmer-Labor Party, in an effort to increase its electoral base, made an apparent decision to cooperate with a fusion effort by the New Party. Such a strategic political decision is precisely the type of autonomous judgment that the Court has immunized from governmental control. If an established political party perceives an advantage in forging a formal electoral alliance with a third party, Minnesota is precluded by the First Amendment from vetoing that judgment.

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[14] When a political party functions as an integral part of the state-administered nomination process, it looses aspects of its autonomy and become subject to narrow regulation designed to protect the equal right to vote. *See Morse v. Republican Party of Virginia*, 517 U.S. __, 116 S.Ct. 1186 (1996); *Terry v. Adams*, 345 U.S. 461; *Smith v. Allwright*, 321 U.S. 649.

D. An Absolute Ban On Fusion Candidacies Violates A Candidate's Right To Embrace A New Constituency

No candidate can be compelled to serve as an involuntary standard bearer. But where, as here, a candidate wishes to accept the formal electoral support of a new constituency, the state may not lightly veto such an important political judgment. Unlike *Storer v. Brown*, 415 U.S. 724, where a decision to disaffiliate from one party in order to become the candidate of a rival party threatened to turn *intra*-party squabbles into a centrifugal force that could tear the party apart, fusion candidacies pose no immediate threat to the integrity or stability of either party-participant.

E. An Absolute Ban On Fusion Candidacies Insulates Major Parties Against Effective Third-Party Competition

Established political parties have an obvious stake in persuading the legislature to inhibit the emergence of powerful competitors. In the absence of a legislatively imposed ban on fusion candidacies, major parties would constantly be tempted to enter into fusion electoral alliances with third parties in order to increase the likelihood of winning a particular election, thereby allowing third parties to enter the arena of power. That is precisely what appears to have happened in this case.

It is at this point that anti-fusion law enters the equation. For, if law can be counted on to bar fusion candidacies, neither major party faces the threat of a genuine competitor. Laws banning fusion candidacies thus represent classic efforts to shield major parties from effective competition by newcomers. As such, they fall directly in the path of the decisions of this Court striking down efforts to prevent third parties from emerging as genuine competitors to

the major parties. *E.g.*, *Williams v. Rhodes*, 393 U.S. 23; *American Party of Texas v. White*, 415 U.S. 767; *Anderson v. Celebrezze*, 460 U.S. 780. *See also Storer v. Brown*, 415 U.S. 724.

In both *Williams v. Rhodes* and *Anderson v. Celebrezze*, the Court invalidated state statutes that made it unfairly difficult to challenge the electoral hegemony of the two major parties. In *Williams v. Rhodes*, Ohio made it virtually impossible for a minor party to qualify for the ballot. In *Anderson v. Celebrezze*, filing deadlines made it extremely difficult for an independent candidate to challenge the two major parties. *See also Storer v. Brown*, 415 U.S. 724 (remanding for a determination of whether California's ballot access rules unfairly prevent third parties from achieving ballot status).

In this case, Minnesota permits third parties to obtain ballot status, but insulates the two major parties from the threat of real competition by making it unlawful for a third party to mount a fusion candidacy. Anti-fusion laws function, therefore, as government-imposed barriers to entry, shielding dominant parties from the threat of competition from newcomers. When barriers to entry unfairly block competition in an economic market, the anti-trust law provide a remedy. When government imposed barriers to entry unfairly block political competition, the First and Fourteenth Amendments require their removal.

F. Minnesota Has Clearly Failed To Carry Its Heavy Burden Of Justification

Minnesota's argues that banning fusion candidacies imposes merely a trivial burden on the right to vote, and to associate for the advancement of political ends. Since the burden is minimal, Minnesota argues, the state's burden of justification should also be correspondingly low. As *amici*

have demonstrated, however, banning fusion candidacies severely impinges on the right to vote, the right to run for office, and the right to associate for political ends. Whether the ban on fusion is viewed from the perspective of a third-party voter, the third party itself, the major party, or the candidate, an absolute ban on fusion candidacies imposes dramatic restrictions on the ability to engage in the democratic process. Only the most compelling showing of social need could justify such an incursion into political freedom.[15]

Not only has Minnesota failed to make such a showing, the justifications put forth in defense of the fusion ban do not even rise to the level of legitimate state interests.

Minnesota's first justification, that voters might be confused by the appearance on the ballot of a single candidate as the nominee of more than one party, is frankly contemptuous of the intelligence of the electorate. Voters are quite capable of understanding that a nominee has earned the support of more than one political party. In the context of commercial speech, this Court has emphatically rejected similar efforts to limit First Amendment activity in a paternalistic effort to rescue consumers from their alleged incompetence. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Linmark Associates v. Township of Willingboro*, 431 U.S. 85 (1977); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. __, 116 S.Ct. 1495 (1996). If paternalistic assumptions about consumer incompetence cannot justify censoring commercial advertising, surely a similar assumption of voter ignorance cannot justify a dramatic interference with political freedom.

[15] This Court has described the precise legal standard in varying terms, ranging from traditional strict scrutiny, to a weighted balancing test. *Amici* believe that the verbal articulation of the standard is less important than the consensus agreement that government regulations impinging on the democratic process must be nondiscriminatory, and be justified by a showing of grave need. *Burson v. Freeman*, 504 U.S. 191 (1992).

Minnesota's second justification, that fusion candidacies blur the clarity of electoral outcomes, is equally unavailing. The argument cannot be that fusion makes it more difficult to determine the winning candidate, since a simple exercise in addition is all that is necessary. Rather, the argument turns on an unspoken assumption that a candidate with support from two political parties is less entitled to the cumulative vote than a candidate of a single party. Thus, under Minnesota's assumption, a candidate with 9 votes from a major party, and 2 votes from a third party, is not a clear winner over a candidate who received only 10 votes from a major party. That argument is not, however, about the difficulty of identifying a winner. It is an argument in favor of entrenching the two-party system by law.

At bottom, Minnesota's opposition to fusion candidacies is not based on concerns about voter incompetence, or the inability to do simple addition. Rather, it is a concern that fusion may result in more finely tuned electoral behavior, with voters choosing to use a third-party fusion candidacy as a way of instructing the winner about how to govern. The result, Minnesota fears, will be a decline in the power of the two major parties, and a proliferation of more narrowly focussed political groupings.

Reasonable people may differ about the wisdom of funneling the nation's political energy into two "umbrella" political parties, who enjoy an exclusive franchise on political power. But the Court has never suggested that legitimate concern with the stability and integrity of the major political parties could mutate into laws entrenching them against effective political competition. *O'Hare Truck Service, Inc. v. City of Northlake*, __ U.S. __, 64 U.S.L.W. 4694 (June 28, 1996)(desire to stabilize major parties through political patronage cannot override First Amendment rights of free

speech and association); *Board of County Commissioners v. Umbehr*, __ U.S. __, 64 U.S.L.W. 4682 (June 28, 1996) (same).

Ultimately, the people will decide whether the existing two-party system is the best way to organize our political energy, or whether new forms of political organization are necessary to carry American democracy into the 21st century. Laws such as Minnesota's absolute ban on fusion candidacies that tilt the electoral playing field in order to entrench the major parties' monopoly on political power -- not because the people choose them freely, but because the election laws are rigged to exclude alternative choices -- have no place in our democratic life.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

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